Supreme Court, U.S.
FILED
AUG 12 1992
OFFICE OF THE CLERK

No. 92-32

# In the Supreme Court of the United States

OCTOBER TERM, 1992

HECTOR ACEVEDO-RAMOS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
*Solicitor General*

ROBERT S. MUELLER, III
*Assistant Attorney General*

THOMAS M. GANNON
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## QUESTION PRESENTED

Whether petitioner waived his statute of limitations defense by his plea of guilty.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 5 |
| Conclusion | 12 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Benes* v. *United States*, 276 F.2d 99 (6th Cir. 1960) | 10 |
| *Biddinger* v. *Commissioner of Police*, 245 U.S. 128 (1917) | 5 |
| *Capone* v. *Aderhold*, 65 F.2d 130 (5th Cir. 1933) | 5 |
| *United States* v. *Akmakjian*, 657 F.2d 12 (9th Cir. 1981) | 9 |
| *United States* v. *Arky*, 938 F.2d 579 (5th Cir. 1991), cert. denied, 112 S. Ct. 1268 (1992) | 7 |
| *United States* v. *Broce*, 488 U.S. 563 (1989) | 6 |
| *United States* v. *Caldwell*, 859 F.2d 805 (9th Cir. 1988), cert. denied, 489 U.S. 1039 (1989) | 10 |
| *United States* v. *Cook*, 84 U.S. (17 Wall.) 168 (1872) | 5 |
| *United States* v. *Cooper*, 956 F.2d 960 (10th Cir. 1992) | 5, 8 |
| *United States* v. *Del Percio*, 870 F.2d 1090 (6th Cir. 1989) | 10 |
| *United States* v. *DeTar*, 832 F.2d 1110 (9th Cir. 1987) | 7, 9 |
| *United States* v. *Doyle*, 348 F.2d 715 (2d Cir.), cert. denied, 382 U.S. 843 (1965) | 7, 9, 10 |
| *United States* v. *Karlin*, 785 F.2d 90 (3d Cir. 1986) | 5 |
| *United States* v. *Levine*, 658 F.2d 113 (3d Cir. 1986) | 10 |
| *United States* v. *Meeker*, 701 F.2d 685 (7th Cir.), cert. denied, 464 U.S. 826 (1983) | 5, 10 |
| *United States* v. *Minor*, 756 F.2d 731 (9th Cir. 1985), vacated, 474 U.S. 991 (1985) | 10 |
| *United States* v. *Torres Lopez*, 851 F.2d 520 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989) | 3 |

Cases—Continued: Page

*United States* v. *Walsh*, 700 F.2d 846 (2d Cir. 1983) ..... 5
*United States* v. *Wild*, 551 F.2d 418 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977) ..... 5, 10
*United States* v. *Williams*, 684 F.2d 296 (4th Cir. 1982), cert. denied, 459 U.S. 1110 (1983) ..... 5, 7
*Valencia* v. *United States*, 923 F.2d 917 (1st Cir. 1991) ... 6-7
*Waters* v. *United States*, 328 F.2d 739 (10th Cir. 1964) ... 5

Statutes:

18 U.S.C. 1962(c) ..... 2
18 U.S.C. 1962(d) ..... 2
28 U.S.C. 2255 ..... 3

# In the Supreme Court of the United States

OCTOBER TERM, 1992

---

No. 92-32

HECTOR ACEVEDO-RAMOS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 961 F.2d 305. The opinion of the district court (Pet. App. 8a-16a) is reported at 787 F. Supp. 16.

### JURISDICTION

The judgment of the court of appeals was entered on April 9, 1992. The petition for a writ of certiorari was filed on July 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following his plea of guilty in the United States District Court for the District of Puerto Rico, petitioner was convicted of participating in the conduct of

the affairs of an enterprise, in violation of the RICO statute, 18 U.S.C. 1962(c) (Count 1), and of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 2). The district court sentenced him to consecutive terms of 15 years' imprisonment on each count, to be served consecutively to sentences imposed in two other cases. The district court also fined petitioner $40,000 and ordered him to make restitution in the amount of $889,089.30. Petitioner subsequently moved for post-conviction relief. The district court denied the motion, Pet. App. 8a-16a, and the court of appeals affirmed, *id.* at 1a-7a.

1. On June 26, 1986, a federal grand jury returned a five-count indictment charging petitioner and eight others with substantive and conspiracy violations of the RICO statute. The charges, which involved conduct that began in October 1973 and continued into 1985, identified 18 predicate racketeering acts: seven murders, six armed robberies, one kidnapping and extortion, one theft from interstate commerce shipment, two arsons, and one attempted obstruction of justice. On November 24, 1986, the grand jury returned a superseding indictment that corrected typographical and technical errors in the earlier indictment, but did not materially alter the charges against petitioner and his co-defendants. Gov't C.A. Br. 3-4.

All of the defendants except petitioner and Angel Torres-Lopez pleaded guilty. Prior to trial, Torres-Lopez moved to dismiss the substantive RICO charge as barred by the statute of limitations. Petitioner joined in the motion. Pet. App. 2a. After the district court denied the motion, the trial of petitioner and Torres-Lopez began on January 27, 1987. Days later, petitioner entered an unconditional plea of guilty to Counts 1 and 2 of the indictment. Gov't C.A. Br. 4.

Petitioner's counsel described the plea as "the only solution." C.A. App. 162.

During the plea proceeding, petitioner admitted committing two of the predicate acts listed in Count 1, the armed robbery of a jewelry store in April 1980 and the armed robbery of a diamond manufacturing plant in March 1981. C.A. App. 166-167. The government proffered, as a factual basis for the plea, evidence that petitioner had participated in six of the racketeering acts alleged in Count 1, including a kidnapping and extortion in September 1982. *Id.* at 173-178; see *id.* at 128-129. The statute of limitations was not discussed during the plea colloquy. Pet. App. 2a; see C.A. App. 159-181. On April 9, 1987, petitioner was sentenced. *Id.* at 221.

2. The jury convicted Torres-Lopez on the substantive RICO charge and the RICO conspiracy charge, and he appealed. More than a year after the district court sentenced petitioner, the court of appeals reversed Torres-Lopez's conviction on the substantive RICO count, holding that the predicate acts for which the jury found him guilty did not take place within the five-year limitations period. *United States* v. *Torres Lopez*, 851 F.2d 520, 522-525 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989). Petitioner then filed a motion, which the district court treated as a motion for post-conviction relief under 28 U.S.C. 2255, to vacate his sentence on the substantive RICO count. Petitioner claimed, like Torres-Lopez, that his substantive RICO conviction should be reversed because the statute of limitations had expired on the predicate acts that he had admitted committing. In response, the government contended that petitioner, by his guilty plea, had waived the statute of lim-itations defense, and that in any event Count 1 of the

indictment charged predicate racketeering acts that fell within the limitations period. Pet. App. 2a-3a.

The district court ruled that the running of the statute of limitations does not affect the subject-matter jurisdiction of the court and that a statute of limitations defense is waived unless it is affirmatively asserted. Pet. App. 10a. The court further held that a waiver of a statute of limitations defense need not be explicit but can be inferred from a guilty plea. *Id.* at 10a-16a. The court then concluded that petitioner had waived the defense by pleading guilty. *Id.* at 16a. In light of that holding, the court did not reach the question whether the predicate racketeering acts charged in Count 1 fell within the limitations period. *Id.* at 9a.

3. The court of appeals affirmed. Pet. App. 1a-7a. The court first held that the statute of limitations "is a waivable affirmative defense and therefore does not affect a court's jurisdiction." *Id.* at 4a. The court also concluded that a waiver of the defense need not be explicit; rather, "like other affirmative defenses, the statute of limitations is deemed waived when a defendant pleads guilty even if the defendant did not make a knowing and express waiver of the defense." *Id.* at 7a. The court noted that because petitioner had raised the statute of limitations issue by motion before entering his plea, "there is even less reason [than in the ordinary case of a guilty plea] to believe that [petitioner] was unaware that he was waiving the defense by pleading guilty." *Id.* at 6a. Having found that petitioner had waived the limitations defense, the court did not address the question whether the predicate acts charged in Count 1 of the indictment occurred within the limitations period. *Id.* at 7a.

## ARGUMENT

Petitioner contends (Pet. 4-8) that the court of appeals erred in holding that his guilty plea waived a defense based on the statute of limitations, and he argues that the decision below conflicts with decisions of other courts of appeals. Those contentions are without merit and do not warrant this Court's review.

1. The court of appeals correctly held that the running of the statute of limitations does not defeat a trial court's jurisdiction. Rather, it is an affirmative defense that is waived if it is not raised before or during a defendant's trial. See, *e.g.*, *United States* v. *Karlin*, 785 F.2d 90, 92 (3d Cir. 1986); *United States* v. *Walsh*, 700 F.2d 846, 855 (2d Cir. 1983); *United States* v. *Williams*, 684 F.2d 296, 299 (4th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); *United States* v. *Wild*, 551 F.2d 418, 422 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977); *Capone* v. *Aderhold*, 65 F.2d 130, 131 (5th Cir. 1933); see also *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917); *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 178 (1872). To benefit from a limitations defense, a defendant must affirmatively assert it. *United States* v. *Meeker*, 701 F.2d 685, 687 (7th Cir.), cert. denied, 464 U.S. 826 (1983).[1]

Petitioner suggests, however, that even if the statute of limitations defense is not jurisdictional, the defense can be raised through a collateral attack on a

[1] The only decision suggesting that the statute of limitations defense is jurisdictional, *Waters* v. *United States*, 328 F.2d 739, 743 (10th Cir. 1964), is of no assistance to petitioner. *Waters* held only that the statute of limitations could be raised for the first time on appeal, not that it could be used to attack a guilty plea collaterally. In any event, the Tenth Circuit has since rejected the view that the running of the statute of limitations defeats a court's subject-matter jurisdiction. *United States* v. *Cooper*, 956 F.2d 960, 962 (10th Cir. 1992).

guilty plea unless the record shows that the defendant knowingly and intentionally waived the defense when he pleaded guilty. Pet. 5. That claim is strikingly similar to the claim that this Court rejected in *United States* v. *Broce*, 488 U.S. 563, 573 (1989). In that case, after Broce had pleaded guilty, a defendant in a parallel criminal prosecution prevailed before the court of appeals on a claim that a comparable indictment should be dismissed on double jeopardy grounds. Broce sought to rely on that decision in moving to vacate his guilty plea; he asserted that he had never intentionally relinquished (or even been aware of) his double jeopardy claim. This Court disagreed that such specific relinquishment was required:

> Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty. Waiver in that sense is not required. * * * In sum, as we explained in *Mabry* v. *Johnson*, 467 U.S. 504, 508 (1984), "[i]t is well settled that a voluntary and intelligent plea of guilty by an accused person, who has been advised by competent counsel, may not be collaterally attacked." That principle controls here.

488 U.S. at 573-574. In light of *Broce*'s holding that a constitutional claim is relinquished by a guilty plea despite the absence of an express waiver, petitioner's contention that a statute of limitations defense cannot be relinquished by a guilty plea absent an express waiver necessarily fails.

*Broce*'s holding follows from the nature of a guilty plea and the strong societal interest in protecting the finality of convictions. A plea of guilty constitutes an admission of guilt and a waiver of all non-jurisdictional defects in the prosecution. *Valencia* v. *United*

*States*, 923 F.2d 917, 920-921 (1st Cir. 1991); *United States* v. *Doyle*, 348 F.2d 715, 718 (2d Cir.) (cases "are legion" holding that a plea waives non-jurisdictional defenses), cert. denied, 382 U.S. 843 (1965). A district judge conducting a plea allocution is not required to ask a defendant about the waiver of every conceivable defense that might be raised at trial; if that were the rule, no plea agreement would ever be sufficient to protect against a subsequent collateral attack. Thus, the limitations defense, like other affirmative defenses, "is deemed waived when a defendant pleads guilty even if the defendant did not make a knowing and express waiver of the defense." Pet. App. 7a; *United States* v. *Doyle*, 348 F.2d at 719 (unqualified plea of guilty bars consideration of limitations defense); cf. *United States* v. *Arky*, 938 F.2d 579, 582 (5th Cir. 1991) (finding no reason why a statute of limitations defense "alone, of all the defendant's affirmative defenses, should not be waived if not asserted at trial"), cert. denied, 112 S. Ct. 1268 (1992).[2]

In any event, even if it were necessary to establish a knowledgeable waiver, petitioner's guilty plea, after he had joined co-defendant Torres-Lopez's unsuccessful statute of limitations motion in the district court, would appear to satisfy that showing. When a defense has previously been raised in a case, only to be abandoned by the defendant's knowing and voluntary decision to plead guilty, there is "even less reason to believe that [he] was unaware that he was waiving the

---

[2] The limitations defense has been deemed waived in situations not involving a guilty plea, despite the lack of an express and knowing waiver. See *United States* v. *Williams*, 684 F.2d 296, 299-300 (4th Cir. 1982) (request for lesser-included offense instruction on allegedly time-barred charge waives limitations defense), cert. denied, 459 U.S. 1110 (1983); *United States* v. *DeTar*, 832 F.2d 1110, 1115 (9th Cir. 1987) (same).

defense by pleading guilty" than there would have been if the defense had never been raised. Pet. App. 6a.

2. Petitioner contends (Pet. 5-8) that the decision in this case conflicts with the decisions of other circuits, which he asserts have required an express waiver in order to relinquish a statute of limitations defense. Although there is language in some decisions that supports petitioner's position, there is no conflict in the circuits warranting this Court's review.

In *United States* v. *Cooper*, 956 F.2d 960 (10th Cir. 1992), the court of appeals allowed a defendant who had pleaded guilty to raise a statute of limitations defense because there had been no "express waiver" of that defense. *Ibid.* The facts of *Cooper*, however, are quite different from the facts here. In *Cooper*, the defendant pleaded guilty pursuant to a plea agreement reached before the statute of limitations had run; after entering the plea, she learned that the information, although timely lodged with the court by the government, had not been filed until after the statute of limitations had expired.[3] The defendant raised the statute of limitations defense in the district court as soon as she learned of the facts supporting it, but the district court held that the defense was waived by her guilty plea. The court of appeals reversed, stating that "while we agree with those courts which hold a defendant can waive the statute of limitations," there was no express waiver in the case before it. 956 F.2d

---

[3] "The record indicates that the government presented the information to the court before the statute expired, but it was retained by the court's staff and not actually lodged or docketed until after Ms. Cooper's arraignment." 956 F.2d at 961 n.2.

at 962. The court concluded that "[t]he defendant simply entered a plea to a barred charge" and was entitled to relief. *Id* at 963.

While we disagree with the court's analysis in *Cooper*, the unusual facts of that case are not comparable to this case. In *Cooper*, the court noted that the defendant (as well as the government) had been "misled into believing the information had been filed timely," and concluded that in those circumstances no waiver had occurred. 956 F.2d at 960. Here, in contrast, petitioner joined in Torres-Lopez's motion to dismiss based on the statute of limitations, and he therefore cannot credibly claim that he was unaware that he was waiving the limitations defense when he pleaded guilty. Moreover, the defendant in *Cooper* raised the statute of limitations defense at her earliest opportunity, immediately after learning of the basis for it, and pursued it on direct appeal. Petitioner, however, abandoned that defense through his plea and did not renew it until after Torres-Lopez had prevailed in the First Circuit; only then did petitioner commence his collateral attack on the judgment. On the facts of this case, there is no reason to believe that the Tenth Circuit would relieve petitioner in collateral proceedings of the consequences of his guilty plea.

Petitioner's reliance (Pet. 5-6) on *United States* v. *Akmakjian*, 647 F.2d 12, 14 (9th Cir. 1981), and *United States* v. *Doyle*, 348 F.2d at 718-719, is also misplaced. In *Akmakjian*, the defendant expressly waived the statute of limitations defense and pleaded guilty, but the Ninth Circuit did not suggest that an express waiver of that defense was required. Indeed, in other contexts that court has not required an express waiver to forfeit a statute of limitations defense. See *United States* v. *DeTar*, 832 F.2d at 1115

(rejecting express waiver requirement when defendant requests a lesser-included offense instruction on a time-barred charge); *United States* v. *Minor*, 756 F.2d 731, 737 (9th Cir. 1985) (per curiam) (statute of limitations defense is waived if not timely raised in the trial court), vacated on other grounds, 474 U.S. 991 (1985). In *Doyle*, the court explicitly ruled that the defendant's guilty plea, without more, foreclosed a claim based on the statute of limitations; only as an alternative ground for decision did the court note that the defendant had expressly waived the defense. 348 F.2d at 719-720; see Pet. App. 5a.

The other cases petitioner cites are even farther afield. Most of those cases do not involve guilty pleas at all. Rather, they involve cases in which the courts held that a defendant's voluntary preindictment agreement to an extension of the statute of limitations constitutes a waiver of that defense.[4] In one other case, *Benes* v. *United States*, 276 F.2d 99, 108-109 (6th Cir. 1960), the court held that because the statute of limitations is not tolled by the government's voluntary agreement to delay prosecution, the limitations period had in fact expired. *Id.* at 109. And in *United States* v. *Levine*, 658 F.2d 113, 129 (3d Cir. 1981), the court simply "determined that the denial of the motion to dismiss on the statute of limitations

---

[4] See, *e.g.*, *United States* v. *Del Percio*, 870 F.2d 1090, 1093 (6th Cir. 1989); *United States* v. *Caldwell*, 859 F.2d 805, 806 (9th Cir. 1988), cert. denied, 489 U.S. 1039 (1989). As the court noted in *Cooper*, 956 F.2d at 961 n.3, "[t]hose cases [*Del Percio* and *Caldwell*] are irrelevant to the issue before us [involving the effect of guilty plea]." The decisions in *United States* v. *Meeker*, 701 F.2d 685, 687-688 (7th Cir.), cert. denied, 464 U.S. 826 (1983); *United States* v. *Wild*, 551 F.2d 418, 422 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977), see Pet. 7, are distinguishable for the same reason.

grounds did not fall within the *Cohen* exception to 'final decisions' " and the court therefore had "no jurisdiction" to address the merits.

Even if petitioner were entitled to circumvent his guilty plea and raise a statute of limitations defense, this case does not warrant review, because petitioner's claim is without merit. The government proffered sufficient evidence at petitioner's plea proceeding to support a finding that the substantive RICO offense charged in Count 1 of the superseding indictment occurred within the limitations period. Although petitioner specifically admitted committing only two of the racketeering acts charged in that count, C.A. App. 166-167, he entered an unconditional guilty plea to the entire count, *id.* at 179, and that count alleged that petitioner participated in six racketeering acts, the latest of which, No. 17, was the September 1982 kidnapping and extortion of Mario Consuegra. *Id.* at 173-178; see *id.* at 128-129.

In connection with that predicate act, the government indicated to the court that it was prepared to prove that when one of petitioner's co-conspirators, Alejo Maldonado Medina, was arrested by the FBI (on October 26, 1982), petitioner came to his aid, helped him to arrange for legal representation, and helped him dispose of the proceeds of the kidnapping by buying some gold chains and by accepting approximately $50,000 in cash that the conspirators believed to have been marked by the police. After petitioner accepted the $50,000, he gave $25,000 in clean, unmarked bills to a co-conspirator and kept the other $25,000 as part of his share of the crime's proceeds. See C.A. App. 177. In sum, because petitioner's participation in racketeering act No. 17 took place less than five years before the indictments in the present case were returned, *i.e.*, on June 26, 1986, and

November 24, 1986, respectively, the substantive offenses charged in Count 1 of the indictment fell within the limitations period.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

ROBERT S. MUELLER, III
*Assistant Attorney General*

THOMAS M. GANNON
*Attorney*

AUGUST 1992